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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. 681

WEYERHAEUSER STEAMSHIP COMPANY,
a Corporation,
Petitioner,

vs.

HAROLD YANOW,
Respondent.

REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION.

LASHER B. GALLAGHER,
111 Sutter Street,
San Francisco 4, California,
Counsel for Petitioner.

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Petitioner replies to Respondent's Brief in Opposition as follows:

1. "Respondent does suggest to the Court that the order of the Court of Appeals denying petitioner's motion to recall its mandate may not be an *appealable* order under the judiciary act." (P. 6, R. B. in Opposition.)

Respondent overlooks that plain fact that no *appeal* is involved. This is a proceeding with respect to a writ of certiorari. Petitioner's citation of Art. III, Sections 1 and 2; and Title 28 U. S. C., Sections 1254 (1) and 2106 (Pet.

p. 3, ¶ (b) (iii)) sufficiently answers this contention of respondent.

2. "Certainly, it could be logically held that the district court had the power to relieve appellant from the running of time in which to file his appeal if one of its own arms, namely the court reporter, was unable to function, and, as in this case, produce a transcript of the instructions as given by the court *so that* a *timely* motion for a new trial *could be made*." (P. 5, R. B. in Opposition.)

No citation of any statute, rule or decision of any court is or could be mentioned in support of this insupportable assertion.

All respondent was required to do in order to preserve his right to appeal after the expiration of thirty days from the date of the entry of the judgment in the district court was to *serve* a motion for a new trial not later than ten days after the entry of the judgment. It could have been *filed* within a reasonable time after such service.

Rule 51, FRCP, provides: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Respondent's counsel had a copy of each instruction which had been proposed in written form by *each* of the parties. He knew *before* the case was submitted to the jury which of these instructions had been given or refused

or he could not have stated his objections as is required by Rule 51.

A simple motion for a new trial would have sufficed. "Plaintiff hereby moves the court for an order granting a new trial upon the ground that the court committed prejudicial error in the giving of instructions at the request of the defendant and in the refusal to give instructions at the request of the plaintiff." He did not prepare or serve such a motion although it could have been dictated and typed in less than 30 minutes.

There is only *one* ground upon which a *district court* may *extend* the time for filing a notice of appeal. It is succinctly stated in Title 28 U. S. C. Section 2107, paragraph 4, as follows: "The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect *based on failure of a party to learn of the entry of the judgment, order or decree.*" This provision is not relevant to the case at bar.

CONCLUSION.

It is again respectfully contended that Petitioner is entitled to affirmative relief as prayed for in its petition for a writ of certiorari.

Dated, San Francisco, California,
March 2, 1960.

Respectfully submitted,
LASHER B. GALLAGHER,
Counsel for Petitioner.